UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

SOUTHWEST CONCRETE PLACERS, INC.,

Employer,

and Case 27-RC-8385

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL UNION # 577,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On April 20, 2005, Operative Plasterers and Cement Masons International Association, Local Union #577 filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent all journeymen and apprentice cement masons employed by the Employer. Amadeo E. Ruibal, a hearing officer of the National Labor Relations Board, conducted a hearing on July 26, 2005.[1] Following the hearing, the parties filed briefs.

Based on the record before me, there are two issues to be resolved in this case: (1) Whether the Employer's cement laborers share a sufficient community of interest with the Employer's cement finishers to require inclusion in the petitioned-unit as urged

[1] The processing of this petition was initially delayed due to the processing of blocking unfair labor practice charges filed in Case 27-CA-19582.

by the Employer and (2) Whether it is appropriate to apply the **Daniel/Steiny**[2] construction industry voter eligibility formula as urged by the Petitioner.

The Petitioner does not seek to represent the cement laborers because they were historically excluded from the parties' Section 8(f) collective bargaining agreement and because there are alleged substantial differences between the cement finishers and cement laborers regarding compensation, skills, and experience. As to the second issue, the Petitioner contends that the **Daniel/Steiny** formula should be utilized in the election resulting from the processing of the petition in this matter, because the Employer is primarily engaged in the construction industry.

The Employer argues that, because of the overwhelming community of interest shared by the cement finishers and cement laborers, the only appropriate bargaining unit must include both classifications. With regard to application of the **Daniel/Steiny** formula, the Employer contends that because it employs a core group of employees on a long-term basis, only these core employees should be eligible to vote, even though the Employer is primarily engaged in the construction industry. Specifically, the Employer argues that these core employees constitute a stable workforce that is not laid off as projects are completed and then recalled as new projects commence. The Employer further asserts that any employees, who were hired through the Petitioner's hiring hall under the Section 8(f) agreement (or, presumably, hired off the street since April 30, 2005) to supplement the core group of employees and who may technically

[2] See **Daniel Construction Company**, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967); **Steiny & Co.**, 308 NLRB 1323 (1992).

meet the **Daniel/Steiny** eligibility requirements, have no realistic expectation of future employment and should not be eligible to vote.

I conclude for the reasons enunciated below that the petitioned-for unit is not appropriate and that the only appropriate unit must include both the cement finishers and cement masons as these two classifications of employees work side-by-side performing similar or identical job functions under common supervision and under common terms and conditions of employment. Further, I find that it is appropriate, and, in fact, mandated by the circumstances of this case that the election being directed utilize the **Daniel/Steiny** voter eligibility formula.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, I find that the Employer is a Colorado corporation with its headquarters located in Henderson, Colorado. The Employer, which is engaged in the construction industry, provides concrete finishing services to commercial and residential customers. During the past twelve months, the Employer provided services valued in excess of $50,000 to customers in the State of Colorado, who, in turn, purchased and receive goods and materials valued in excess of $50,000 directly from manufacturers located outside the State of Colorado.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:[3]

INCLUDED: All fulltime and regular parttime cement finishers and cement laborers employed by the Employer from its Henderson, Colorado facility.

EXCLUDED: All office clerical employees, professional employees, guards and supervisors as defined by the Act.

STATEMENT OF THE CASE

Background:

The Employer is a family run corporation, administered entirely by three family members. The president and officer manager is Carrie Nitchoff. The vice president is her husband, Adam Nitchoff, who took over operation of the company from his father in April 1993. Adam Nitchoff is responsible for marketing and scheduling of projects, and he is occasionally involved in the on-site supervision of a workcrew. Adam's brother, Chris Nitchoff, is the field superintendent. Chris Nitchoff is responsible for all employment matters, including hiring all cement finishers and cement laborers. Chris Nitchoff also handles the majority of the day-to-day supervision of the cement finishers

[3] The Petitioner declined to express on the record whether it was willing to proceed to an election in any unit found appropriate and reserved that determination until I ruled on the issues herein. The petition in this case is adequately supported by the recently-expired Section 8(f) collective bargaining agreement, even though the unit found appropriate is slightly larger than the petitioned-for unit. **Stockton Roofing Co.**, 304 NLRB 699 (1991). See also, **Pike Co.**, 314 NLRB 691 (1994).

and cement laborers, although Adam Nitchoff may supervise a job when the Employer is involved in more than one project on a given day. The Employer operates from a 2,400 square foot shop at its principle place of business where all of the cement finishers and cement laborers share access to the tool room, shop, and restroom facilities. Normally, however, the cement masons and cement laborers report directly to the construction jobsites.

Facts:

When not reporting to the shop, the cement finishers and cement laborers all report directly to the construction site where concrete will be poured at either 6:00 a.m. or 7:00 a.m., depending on the time the first concrete pour is scheduled. Both classifications of employees usually work eight-hour shifts, ending between 2:00 p.m. and 3:00 p.m., again depending on the pour schedule and on the work volume. While they generally work eight-hour shifts, the cement finishers and cement laborers occasionally work less if there is insufficient work. Both classifications also work overtime as needed and receive overtime pay after they have worked 40 hours per week. There is no difference between the scheduled start and end times of the cement finishers and cement laborers, and both the cement finishers and cement laborers daily record their time on timecards.

The Employer currently employs approximately 13 cement finishers and 4 cement laborers as part of its core group of employees. As noted above, record testimony and exhibits also confirm that the Employer supplemented this stable core group of employees with employees hired through the Petitioner's hiring hall prior to April 30, 2005, (and, presumably the Employer continues to supplement the core group

of employees with temporary employees hired off the street since the expiration of the most recent Section 8(f) contract). As is also referenced above, the cement finishers were covered by the terms of the Section 8(f) collective-bargaining agreements that date back to at least 1995, but the cement laborers were not. The cement finishers and cement laborers do not currently have any health or pension benefits, however, they do receive holiday bonuses that are based on their wage rates. The cement finishers' wage rates range between $15.00 and $21.00 per hour. The cement laborers' wage rates range from $12.00 to $15.00 per hour. Wage rates are based on the skill level of each employee. There is no evidence that skills are obtained by other than on-the-job training. The Employer requires no specific tests or certifications. The cement finishers and cement laborers are all required to wear safety glasses, hard hats, rubber boots, long pants and shirts with at least four-inch sleeves.

Concrete finishers are expected to have at least two year's experience working with concrete. Concrete laborers are hired with little or no previous experience and receive ongoing training until they are deemed to have the skills warranting a promotion to concrete finisher. Within the past twelve months, four concrete laborers have been promoted to concrete finisher by the Employer. All hiring and promotion decisions are made by Chris Nitchoff. He also conducts the Friday safety meetings, which are attended jointly by the cement finishers and cement laborers.

The Employer either operates with one large crew or divides the cement finishers and cement laborers among two crews, depending on the size of a project. About 80 percent of the work performed by the Employer is on commercial projects, including office buildings, shopping centers, hospitals, schools, and student housing. The

remaining 20 percent is on residential homes, townhouses, condos, and lofts. Typically, the Employer has about six projects underway, but they do not all require the Employer's presence everyday. For example, the Employer has had hospital projects that involved the pouring of about a half million square feet of concrete, spread out over more than a year, with 10,000 square foot pours scheduled approximately once a week. The Employer is not usually involved in placing the concrete forms and required reinforcing materials, or in actually ordering the concrete and pump truck. Normally, the Employer's sole job is to be present at the jobsite just before the concrete arrives; to oversee the pouring of the concrete onto the deck or sidewalk; to spread the concrete while ensuring that the elevation is correct; and to finish the surface. Similarly, the Employer is not normally responsible for stripping the forms or posting the tension after a pour. The exception to this is for curb and gutter projects.[4]

The cement finishers and cement laborers work shoulder to shoulder at the pour site using the same tools except for the power-driven trowling machines, which require the highest level of skill and are operated only by cement finishers. In fact, not all cement finishers are qualified to operate the trowling machines. Both the cement finishers and the cement laborers use shovels, screw rods, bull floats, hand floats, hand trowels, and basic hand tools. At the start of the pour, the cement finishers and cement laborers all work jointly to get the concrete spread into the forms. This involves the laborers distributing the concrete with the pump and shoveling the concrete. The cement finishers also assist with shoveling as needed or until they begin their screeding, leveling, and finishing tasks. As the day wears on, the more skilled workers

[4] The record is silent as to the frequency or percentage of work volume of such curb and gutter projects.

take over doing the finishing and power-driven trowling, but the cement laborers are still involved in trowling the edges and assisting or being trained by the finishers in other aspects of the process. Both cement finishers and cement laborers are involved in the clean up of tools at the end of the day. As noted, the Employer also lays concrete curb and gutter for which it sets and tears down the forms. The record does not disclose whether it is the cement finishers or cement laborers (or both) who set those forms, but does establish that cement finishers and cement laborers are both involved in cleaning the forms.

ANALYSIS AND CONCLUSIONS

Community of Interest issue:

The Petitioner seeks to represent a unit consisting of all "journeyman and apprentice cement masons" employed by the Employer. At the hearing and in its post-hearing brief, the Petitioner specifically noted that it was seeking to represent the same unit it had represented under the Section 8(f) collective-bargaining agreement which expired on April 30, 2005. As noted, that Section 8(f) agreement covered only the Employer's cement finishers. Thus, the Petitioner urges the exclusion of the Employer's cement laborers from the unit found appropriate herein on the basis that they were historically excluded under the Section 8(f) agreement and because there is a "substantial" difference between concrete laborers and concrete finishers relating to their compensation, required experience, and skills. Based on the record herein, and the authority cited below, I find the only appropriate unit must include both the Employer cement finishers and cement laborers, and I shall direct an election in that unit.

It is well settled that bargaining units in the construction industry may be appropriate on the basis of either a craft or departmental unit if the unit is a clearly identifiable and homogeneous group of employees with a community of interest separate and apart from other employees. **R.B. Butler, Inc.**, 160 NLRB 1595 (1966); **Del-Mont Construction Co.**, 150 NLRB 85 (1964); and **S.J. Graves & Sons**, 267 NLRB 175 (1987). However, if there is no craft or homogeneous grouping of employees with a community of interest sufficiently distinct from other employees to constitute a separate unit, an overall unit may be the only appropriate unit. **A.C. Pavement Co.**, 296 NLRB 206 (1989); **The Longcrier Company**, 277 NLRB 570 (1985).

As the Board recently reiterated in **Barron Heating & Air Conditioning, Inc.**, 343 NLRB No. 58 (2004):

> In determining an appropriate bargaining unit, the Board seeks to fulfill the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. It is well settled that the Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be an appropriate unit. [Citations omitted.] Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. **Bartlett Collins Co.**, 334 NLRB 484 (2001).

With regard to determining whether the petitioned-for unit is appropriate in the construction industry, as in other industries, the Board determines whether the employees in the petitioned-for unit "share a sufficient community of interest in view of their duties, functions, supervision, and other terms and conditions of employment, to constitute an appropriate unit. **Johnson Controls, Inc.**, 322 NLRB 669, 670 (1996).

See, also, **Barron Heating**, supra, citing **Johnson Controls**; and **P.J. Dick Contracting Inc.**, 290 NLRB 150 (1988).

While the Board also examines bargaining history, it has held that Section 8(f) bargaining history is not controlling. See e.g. **Barron Heating**, supra, (Section 8(f) contract unit not controlling where union sought different appropriate unit.); **Alley Drywall, Inc.**, 333 NLRB 1005 (2001)(Section 8(f) bargaining unit history is not the conclusive consideration when determining whether petitioned-for unit is appropriate.); **Dezcon, Inc.**, 295 NLRB 109 (1989) (Board's remark in **John Deklewa & Sons**, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (1988), that "in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement" should not be interpreted too broadly.)

Based on the uncontroverted facts regarding the Employer's operation, established by the testimony of Employer's witnesses and the testimony of the Petitioner's business manager regarding why the Petitioner does not seek to represent the cement laborers, I conclude that the petitioned-for unit is not appropriate because it appears to exclude the employees classified by the Employer as "cement laborers" solely on the basis that they are not called "apprentices" by the Employer and on the basis of historical jurisdictional lines drawn between the Petitioner and other construction industry unions. In regard to the latter, business manager Peter Mustacchio testified that the Petitioner was seeking to represent "plasterers and cement masons only," excluding laborers, because "we do not do laborers' work." He further testified that the Petitioner only had one type of collective-bargaining agreement, the one negotiated with the Associated Building Contractors. According to Mustacchio, this

agreement specifically excluded the classification of laborers; and, if the Petitioner is successful in the election directed as a result of this proceeding, the Petitioner would ask the Employer to sign that agreement. I find this argument to be unavailing. Initially, I note that the record does not establish how or if the "cement laborers" at issue in this proceeding would differ from "apprentices," a classification that concededly would be covered by the contract negotiated between the Petitioner and the Associated Building Contractors. Additionally, it is well settled that the Board does not certify unions on the basis of specific work tasks, types of machines operated, or union jurisdictional claims. See e.g. **Mariah, Inc.**, 322 NLRB 586 (1996), **Ross-Meechan Foundries**, 147 NLR 207 (1964), and **Plumbing Contractors Association**, 93 NLRB 1081 (1951).

Turning to specific community interest factors, I find that the similarity in duties, work functions, supervision, and other terms and conditions of employment of the cement finishers and cement laborers requires a finding that the cement finishers do not constitute a clearly identifiable and homogeneous group of employees with a community of interest separate and apart from the employees classified by the Employer as cement laborers. In this regard, the business manager for the Petitioner conceded that the Employer's cement finishers do not possess the same level of skill and training as traditional craft cement masons, nor do they regularly engage in form setting, or decorative concrete work. Thus, other than operating the power-driven trowling machine, the Employer's cement finishers and cement laborers use the same tools and perform basically the same work tasks, the only difference being as it relates to their level of on-the-job training or developed skills. This similarity in work functions, combined with the fact that they have identical supervision, work identical schedules,

and progress to higher wage rates based on improvement in their skills, mandates that the only appropriate unit must include both cement finishers and cement laborers.

Voter eligibility formula issue:

The **Daniel** voter eligibility formula was first adopted in **Daniel Construction Company**, 133 NLRB 264 (1961), and then modified at 167 NLRB 1078 (1967). The **Daniel** formula was then revised by the Board in **S. K. Whitty**, 304 NLRB 776 (1991). In **Steiny & Co.**, 308 NLRB 1323 (1992), the Board decided to re-adopt the **Daniel** voter eligibility formula and require its application to all construction industry elections, absent an express stipulation by the parties to not apply the **Daniel** formula.[5] This holding was affirmed by the Board in **Signet Testing Laboratories, Inc.**, 330 NLRB 1 (1999). Thus, if the Employer herein is a construction industry employer, application of the **Daniel** eligibility formula is required because the Petitioner is unwilling to stipulate to the traditional eligibility formula used in cases outside the construction industry.

In the present case, the Employer does not dispute that it is engaged in the building and construction industry, and the evidence establishes the Employer has historically been party to successive Section 8(f) collective-bargaining agreements with the Petitioner, which are privileged only in the construction industry. Moreover, the record evidence confirms the agreement of the parties that the Employer is involved in the construction industry, as its principle work involves pouring concrete decks at

[5] The **Daniel/Steiny** formula provides that in addition to those eligible to vote under the standard criteria, unit employees are eligible to vote if they have been employed for 30 days or more within the 12-month period immediately preceding the eligibility date for the election, or if they have had some employment in those 12-months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. The **Daniel** formula was later clarified to exclude those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. **Steiny** at 1327.

commercial constructions sites such as office buildings, shopping centers, hospitals, schools and student housing and at residential construction sites such as single-family homes, townhouses, condos, and lofts. The Employer also lays some concrete sidewalks, curbs, and gutters.

The Board in **Steiny**, in determining that the **Daniel/Steiny** formula would apply "in all construction industry elections," specifically rejected the argument raised by the Employer herein:

> We find no reasonable, feasible, or practical means by which to distinguish among construction industry employers in deciding whether a formula should be applied. Because there is admittedly some degree of variety among construction employers and their hiring patterns, any attempt to distinguish between employers requires an elaborate and burdensome set of criteria to be applied and litigated in each hearing. These criteria, for example, must distinguish between employers who hire project-by-project, and those who have a so-called stable or core group of employees. . . . Further, we believe this addition level of analysis is unnecessary because application of the **Daniel** formula itself will, to a substantial extent, answer the question whether a particular construction employer is similar or dissimilar to an industrial employer, or whether it operates with or without a stable core of employees. Thus, if no employees are eligible by virtue of the formula, that shows the employer has an entirely stable work force whose voter pool should not and will not be augmented by intermittently employed employees. On the other hand, if application of the formula renders a number of other voters eligible, to that extent it has been demonstrated that the employer hires intermittently from a group of employees with significant contacts to the employer as determined by the formula. **Steiny**, id at 1327.

Based on the record herein and my finding the Employer is a "construction industry employer," I conclude that, in the absence of the Petitioner's willingness to

stipulate to a standard eligibility formula, I must direct an election applying the **Daniel/Steiny** election eligibility voting formula.[6]

There are approximately 17 employees, plus an unknown number of employees who meet the **Daniel/Steiny** voter eligibility formula, in the bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.[7] Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election,[8] including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those eligible to vote also include those who regularly average four hours per week for the last quarter prior to the eligibility date. Employees engaged in any economic strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date,

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[6] The Employer relies on **King Curb v. NLRB**, 291 F.3d 847 (D.C. Cir. 2002), to support its argument that the **Daniel/Steiny** formula should not be applied in this case. I find that **King Curb** is distinguishable because it involved application of a seasonal employee formula to employees who were hired "for a very brief period to meet a short-lived and unprecedented spike in demand." 291 F.3d at 850. Specifically, the Regional Director in that matter had applied the eligibility formula used in **Daniel Ornamental Iron Co.**, 195 NLRB 334 (1972) (on-call employees eligible to vote if they worked a minimum of 15 days in either of the two three-month periods immediately preceding election). The court disagreed with application of that formula, holding that the Board should not have used a formula that permitted laid-off seasonal employees to vote without first finding that they possessed continuity or regularity of employment. The court remanded the case to the Board for an explanation of why the **Daniel Ornamental** formula was appropriate or for the development of a tailored eligibility formula.

[7] Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

[8] Based on my determination that the **Daniel/Steiny** eligibility formula is applicable, those eligible to vote shall also include those employees in the unit found appropriate who have been employed 30 days or more within the 12 months immediately preceding the eligibility date for the election, or who have had some employment within that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily.

employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL UNION #577

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. **Excelsior Underwear Inc**., 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Co.**, 394 U.S. 759 (1969); **North Macon Health Care Facility**, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **August 26, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **September 2, 2005**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado, this 19th day of August, 2005.

_____/s/ B. Allan Benson_____
B. Allan Benson, Regional Director
National Labor Relations Board
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